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STATE OF MICHIGAN

COURT OF APPEALS

In re ESTATE OF BROWNIE KACHAR.

STANLEY KACHAR,

Appellant,

V

JOHN V DEKU, DANIEL KACHAR, NICHOLAS KACHAR, and KAREN MCKEEN,

Appellees.

UNPUBLISHED
September 08, 2026
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No. 374320
Monroe Probate Court
LC No. 2022-000388-DE

Before: M. J. KELLY, P.J., and O'BRIEN and LIEVENSE, JJ.

PER CURIAM.

Appellant, Stanley Kachar, appeals as of right the final order of the Monroe Probate Court admitting the August 3, 2016 Will of his father, Brownie Kachar, to probate. Appellant also argues the probate court erred in denying his earlier motion for involuntary dismissal under MCR 2.504(B)(2) because the 2016 Will was a product of undue influence by his younger siblings and two of Brownie's other children, Daniel Kachar and Karen McKeen (Appellees). We disagree and affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. THE 2002 WILL AND BROWNIE'S CAR ACCIDENT

This case begins in 2002. On November 8, 2002, Brownie executed a will ("the 2002 Will") devising his real property in LaSalle Township to appellant, Daniel, and his third son

Nicholas Kachar[1] as joint tenants with full rights of survivorship, and the remainder of his estate in equal shares to appellant, Daniel, Nicholas, and Karen. The 2002 Will appointed appellant as personal representative of Brownie's estate. Also on that date, Brownie executed a Durable Power of Attorney for Healthcare naming appellant as his patient advocate, and a Durable Power of Attorney (DPOA) naming appellant as his attorney-in-fact. All these documents were drafted by Brownie's attorney Peter K. Fales.

Relevant to this dispute, and according to Daniel, sometime in 2009, Brownie loaned appellant $50,000.

On November 2, 2015, when Brownie was 88 years old, he suffered injuries in a head on motor vehicle collision. Brownie was in a coma for some time, but he was discharged from the hospital to a rehabilitation unit on December 9, 2015. Appellant handled his care as his DPOA at this time. Brownie could not live independently after the accident.

Subsequent neuropsychological screenings in January 2016 identified Brownie suffered "a traumatic brain injury of at least mild severity, and a subsequent host of medically-related mental status changes." The screenings detailed Brownie had "difficulty understanding, remembering and carrying out verbal instructions," was "concrete in his thinking, perseverative," and "could not formulate plan for care needs, has trouble with numeracy and planning[.]" Brownie's "current degree of impulsivity and disorganization was inconsistent with [his] preinjury level of functioning." The neuropsychological screening recommended that the DPOA for Healthcare be activated. Brownie was released to his home in February 2016 but returned to another rehabilitation facility from which he was released on April 1, 2016.

B. BROWNIE'S POST-ACCIDENT ADJUSTMENT

Brownie was difficult with in-home nursing staff. On April 28, 2016, Brownie "became irate" at appellant "and the nurses who were discussing his care without including him in the discussion and insisted he should be making decisions regarding his own care." The discussion "escalated into an altercation, with [appellant] advancing on [Brownie] in a manner [Brownie] perceived as threatening and [Brownie] then picked up a [barbecue] fork to defend himself." Appellant left Brownie at his home and called Daniel to take Brownie to the hospital for evaluation by Dr. Owen Perlman, one of Brownie's doctors when appellant was managing his care. On the way to the hospital, however, Brownie asked Daniel to drive him to Fales's law office, but the office was closed.

Soon thereafter, Brown moved into a rehabilitation facility. Daniel recounted the decision to admit Brownie to Rainbow Rehabilitation, an inpatient psychiatric facility:

[1] Nicholas sometimes lived in Texas during the proceedings. Nicholas is listed as a self-represented appellee perhaps due to his interest in the dispute but did not file a brief on appeal and was not as involved in Brownie's care as the other siblings during the time the 2016 Will was executed.

> [Brownie] made it clear to all of us when that Doctor, after the evaluation, the Doctor stated that he was able to go home with 24-hour nurse case, or he could be put into a facility, but it was totally up to him and the Doctor pointed at [appellant]. We took a vote, we took a vote in the room, it was my uncle Sam,[2] there was Stan, my dad, my sister and I. Karen and I voted to send him home, Sam and Stan voted to take him to the facility, and my dad said I vote to go home, this is a democracy, it is a majority, but it didn't go that way, he went to Rainbow.

Appellant then filed an emergency petition for guardianship of Brownie on May 2, 2016, to ensure he could admit Brownie to Rainbow, against Daniel and Karen's wishes, and Brownie was admitted to Rainbow around that time. After Brownie's admission, Karen and Daniel stopped communicating with appellant and the family stopped getting along.

Fales visited Brownie at Rainbow Rehabilitation on May 9, 2016, and recalled "he emphatically wanted to get out of Rainbow [], he wanted to go home." Brownie was very upset at appellant for making him go to Rainbow. According to Karen, appellant never visited Brownie once at Rainbow, and according to Daniel, Brownie's "wound[3] was getting worse" at Rainbow.

On May 26, 2016, Brownie appeared before the probate court and revoked his DPOA for Healthcare on the record. Instead of appointing appellant, the probate court appointed Marianne Gaynor as Brownie's temporary guardian. The Letters of Guardianship identified Brownie as a legally incapacitated individual, and stated Gaynor had "care, custody, and control of the individual together with all authority and responsibilities granted and imposed by law," without any exceptions or limitations. Daniel said he had nothing to do with Brownie revoking the DPOA.

On June 13, 2016, Brownie made a complaint to Daniel that a doctor and his assistant at Rainbow "anally raped" Brownie the week prior, on or about June 7. Brownie also alleged the staff at Rainbow were dehydrating him. Daniel filed a police report with the Farmington Hills Police Department,[4] and an officer was dispatched to Rainbow for a welfare check. It appears from the report that the doctor and assistant needed to restrain Brownie to perform a medical procedure or place a device to treat his "wound" and prevent him from soiling himself. Brownie told the police officer he did not want to be at Rainbow, and "Brownie advised that he [was] in the process [of] getting guardianship changed so that he can accomplish this." No criminal charges

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[2] Sam is Brownie's brother.

[3] This may be referring to a bedsore or a wound near the anus due to "constant diarrhea." Daniel testified Brownie grew angrier during his stay because it was painful for him when the nursing staff tried to clean him and clean the "wound."

[4] Daniel informed Alyssa Pelito, Brownie's case worker at Rainbow, of the allegation, and Pelito arranged for Brownie to be examined at a hospital. Gaynor was also made aware of the allegation. She reported to the probate court that Brownie went to a hospital on June 9, 2016, for an examination after the rape allegation, and Daniel later testified that the hospital determined Brownie was not raped.

were brought as a result of the allegation, and Daniel and Karen did not inform Fales or appellant of the allegation.

C. BROWNIE CHANGES HIS GUARDIANSHIP AND HIS WILL

Next, on June 24, 2016, Daniel e-mailed Fales the following, referring to a scheduled evaluation with Dr. Charles Siegerman, possibly related to Brownie's desire to get the guardianship changed:

> My dad has an appointment all of a sudden for a psychiatrist ordered by Dr [Perlman] for Monday at 2:00 pm to evaluate for dementia or Alzheimer's how did this happen and should he go. Then his appointment for Dr []Perlman is Tuesday at 3:45 were you aware of the psychiatrist appointment.

Fales responded: "I was not aware of any appointment for a psychiatrist with Dr. Perlman. Who told you this? These appointments do not make any sense, for evaluation purposes, since a full assessment is scheduled for July." Daniel replied: "I feel this is just another way that they are trying to railroad my dad. I know he doesn't have dementia are [sic: or] first stages of Alzheimer's. Never knew of this appointment until today and neither did my dad." Despite this uncertainty, Brownie ultimately was evaluated by Dr. Siegerman in June and July 2016 and underwent partial neuropsychological assessments, but Brownie was "unable to complete the testing due to illness." Dr. Siegerman believed that because Brownie was emotional and unhappy being at Rainbow, he was more vulnerable to exploitation by others, but admitted he saw no evidence that Brownie was "bullied" by anyone.

Around this time, Fales contacted Dr. Peter A. Lichtenberg, Ph.D., a clinical psychologist, to schedule a psychological evaluation during the guardianship proceedings to establish Brownie's competency. On July 6, 2016, Dr. Lichtenberg e-mailed Fales to inform him that Dr. Lichtenberg could "come to Brownie's home on July 30th to do the evaluation and have the report by August 3 or 4." Fales forwarded the e-mail to Daniel and Karen.

In the forwarding e-mail, Fales also wrote about Brownie wanting to change his will: "I talked with Brownie this afternoon. He wants to redo his will. I told him a new will now may not be accepted by the court, after his death, due to the recent psychological evaluations done on him. Brownie still wanted to proceed. Therefore, Dan could you provide me with a copy of Brownie's current will."[5]

On July 30, 2016, Dr. Lichtenberg met with Brownie at Rainbow and conducted a neuropsychological evaluation and created a report detailing his findings. Daniel was present during the evaluation, which lasted three hours. The report evaluated Brownie's cognitive

[5] Appellant's attorney read this e-mail into the record while cross examining Fales at the later bench trial on whether Brownie was unduly influenced to execute the 2016 Will. Appellant's attorney tried to assert Fales was working for Daniel and Karen, and "revealing privileged communications to people who are not your clients . . . . "

functioning, orientation, intelligence, math and numeracy skills, and language comprehension. Relevant to this case, the report detailed

> his deficits do not appear to be progressing. Mr. Kachar demonstrated many cognitive strengths including basic reasoning; both verbal and non-verbal, good language and working memory skills and some strengths in visual-spatial problem solving. Mr. Kachar exhibited continued deficits in orientation, executive functioning, impulsivity, and learning and memory for new information. The results, with his deficits most prominently in executive functioning skills, are entirely consistent with his brain injury from the motor vehicle accident . . . .

Finally, regarding Brownie's feelings toward appellant, the report detailed

> Mr. Kachar stated he was amenable to having a guardian, and that it would be helpful to have someone looking over his care and finances. He stated that he no longer wanted [appellant] to be his DPOA and certainly not his guardian as "[Appellant] got greedy for control." Mr. Kachar expressed that [appellant] as his DPOA did not allow Mr. Kachar any sense of control. He also noted [appellant] has not visited him since their altercation in late April. Mr. Kachar stated that he wants his son [Daniel] and daughter [Karen] to be his guardian(s).

The report stated Brownie "meets the legal standard for lacking capacity to make informed decisions (particularly with regard to the level of care needed, and financial management)," but "demonstrated many cognitive strengths in both verbal and non-verbal basic reasoning and problem solving, and thus can meaningfully contribute to the discussion of who is appointed to be his guardian," and "demonstrated intact decisional abilities (choice, understanding, appreciation and rationale) regarding his desire for his children [Daniel] and/or Karen to be his guardian(s)."[6]

Dr. Lichtenberg also filled out a Physician's Report, that the probate court uses for the guardianship proceedings, which detailed that Brownie "suffers from the following physical or psychological infirmities":

> Cognitive impairment as a result of his 2015 Motor Vehicle Accident. Mr. Kachar's cognitive impairment is not progressive, and he has many cognitive strengths including verbal and visual-perceptual intelligence, language and reading skills. His cognitive impairmen[t] includes awareness of deficit, disorientation, decreased learning and memory, decline in complex problem solving and numeracy.

The report further detailed "these infirmities interfere in the following ways with the individual's ability to receive or evaluate information in making decisions":

[6] Fales admitted at the bench trial that he did not ask Dr. Lichtenberg to assess Brownie for his susceptibility for undue influence.

> Mr. Kachar demonstrated the ability to participate in many decisions including where he would like to live, and who he would like his guardian to be (and is amenable to having a guardian) based on my assessment of his decisional ability skills. His deficits are of sufficient severity that they preclude independent living without supervision, assistance with finances and medications.

Finally, the report stated Dr. Lichtenberg believed Brownie was "not presently able to make informed decisions on" . . . "consenting to supportive services" and "handling personal financial affairs." The form left unchecked two boxes: one about "determining where to live" and another about "authorizing or refusing medical treatment," meaning Brownie was able to make informed decisions on those issues.

Gaynor arranged Brownie's discharge from Rainbow Rehabilitation for August 1, 2016, and he returned home. Though the exact details are contested, it appears from the record that on that day, Daniel dropped Brownie off at Fales's office to discuss executing a new will, including "who he wanted in it and who he wanted out." Among other things, Brownie told Fales that appellant owed him money and "refused" to pay it back.

On August 1, 2016, the Monroe Probate Court changed Brownie's guardianship status from an unlimited guardianship under Gaynor to a temporary guardianship, and appointed Daniel and Karen as Brownie's co-guardians, with limited "authority to pay bills, and authority to make medical and placement decisions." The letters of guardianship did not identify Brownie as a legally incapacitated individual. The probate court stated Daniel and Karen were appointed because Brownie indicated he wished for them to be his temporary co-guardians.

Also on August 1, 2016, Fales e-mailed Dr. Lichtenberg the statutory requirements for "mental capacity" to make a will listed in MCL 700.2501(2), and inquired as to Dr. Lichtenberg's opinion as to whether Brownie had the mental capacity to make a new will:

> I am doing a new will for Brownie Kachar. I need to know if, in your opinion, Brownie Kachar has the mental capacity to make a new will. Michigan law says a person is capable of making a will if the following requirements are met:
>
> A. The individual has the ability to understand [] that he is providing for the disposition of his property after death.
> B. The individual has the ability to know the nature and extent of his property.
> C. The individual knows the natural objects of his bounty.
> D. The individual has the ability to understand in a reasonable manner the general nature and effect of his act in signing the will.
>
> What is your opinion?

Dr. Lichtenberg replied "I have no doubts that he is capable of making a new will. His decision making abilities are a strength." That same day, Fales e-mailed Dan and Karen to set up a date and time for Brownie to sign the new will.

On August 3, 2016, Dr. Lichtenberg sent the Psychological Evaluation Report to Fales and Fales asked Daniel and Karen to send a check to pay Dr. Lichtenberg for the evaluation. That

same day, Brownie executed a will "revoking and cancelling any and all other Wills, Codicils and Testamentary dispositions," devising the real property in LaSalle Township to Daniel and Karen in equal shares, and devising the remainder of his estate to Daniel and Karen in equal shares. In the 2016 Will, Brownie intentionally disinherited appellant and Nicholas. The 2016 Will also appointed Daniel and Karen as co-personal representatives of Brownie's estate. The will was signed in Brownie's home and was witnessed by Fales and his administrative assistant Linda Novak. Daniel and Karen were not present. During their interactions that day, Fales reviewed the will with Brownie and asked Brownie several questions. Brownie appeared to be alert, looked over the will, and understood the contents of the will, but did not ask any questions about it. Novak testified Brownie "was very adamant that those were the changes he wanted made."

After Brownie executed the new will, Fales e-mailed Daniel and Karen that Brownie wanted them to hold onto the original will. Fales stated "you can pick up the will at my office. I will keep a copy in my file. Also, the fee for doing the will is $300." Daniel could not recall whether he paid the $300 for the new will from his own funds, or whether he picked up the will from Fales.

On August 14, 2016, Daniel changed the locks on Brownie's P.O. Box and started receiving Brownie's mail to ensure his bills were paid as permitted by the limited guardianship, and purportedly because appellant stopped communicating with them. At some point in August, Brownie also wanted appellant removed from being able to access his bank account, but it is unclear whether this happened. Also around this time, Diane Mayernik, Brownie's caseworker that appellant previously hired to coordinate his in-home nursing care, indicated she wanted to resign as caseworker. Karen did not want Mayernik to resign because Mayernik knew Brownie's case best. According to Karen, Mayernik refused to speak to anyone but appellant about Brownie, even though at that point Karen had asked that Mayernik stop speaking to appellant.[7]

In an e-mail to Dr. Lichtenberg sent on August 23, 2016, Fales asked the following regarding Brownie's mental capacity:

> Brownie Kachar currently has a durable power of attorney with his son, [appellant], as Brownie's agent. Brownie Kachar would like to revoke the durable power of attorney. Do you believe Brownie has the mental capacity to revoke the durable power of attorney?

Dr. Lichtenberg replied: "I do. We discussed Brownie's changing relationship with [appellant], and his desire to not have [appellant] have decision making authority over his life."

[7] Mayernik was later deposed and testified that Karen was "verbally aggressive and accusatory" toward her, she "found Karen and Dan to be wanting to please Brownie despite what might be good for Brownie," and that Brownie was "possibly" under Karen and Dan's control. Mayernik also stated Dan and Karen did not want her involved in Brownie's care and did not agree with Mayernik that Brownie should remain in inpatient treatment. Mayernik believed Brownie was "delusional" and "paranoid" but that he was not "severely" traumatically brain injured.

On August 25, 2016, Brownie revoked the DPOA given to [appellant] in November 2002. On October 14, 2016, Fales contacted Daniel and Karen and informed them that appellant wanted to dismiss his petition for guardianship of Brownie but could not dismiss without Brownie's consent. Fales recommended that Daniel and Karen agree to dismissal. Fales also advised that Brownie could create a new DPOA and Healthcare Power of Attorney. Daniel responded: "Just spoke with my dad and he said that is fine with him. Just wanted to be sure that it is recommended by [Dr. Lichtenberg] to allow it. Otherwise is it in his best interest[?]" Fales replied that he would prepare the paperwork to dismiss appellant's still-pending petition for guardianship from May 2, 2016. Karen asked that Fales call her before preparing the paperwork.

The e-mail communications resumed with Fales informing Daniel and Karen that he "prepared a proposed guardianship order. This order states the two of you will be appointed co-partial guardians for Brownie. You will make the legal, placement, and medical decisions for your father. Brownie will make other day to day decisions, is this acceptable? . . . [Appellant]'s petition for guardianship will also be dismissed." Karen responded: "If [appellant] agrees to this does the court recognize the psychiatrists evaluation also? I believe that's very important to have so [appellant] has no leg to stand on in the future. Please let me know your thoughts." Fales replied regarding the language in the proposed guardianship order: "I included language saying the court's finding regarding Brownie's incapacity is based upon Dr. Lichtenberg's report." Later, Fales e-mailed Daniel the petition to review and sign on October 24, 2016.

On November 2, 2016, Daniel and Karen filed the petition with the probate court to make them permanent co-guardians. The petition listed Brownie as an incapacitated individual. The petition stated "Brownie Kachar was involved in a motor vehicle accident in November 2015. Brownie Kachar sustained cognitive brain injuries as a result of the accident. Brownie Kachar needs assistance in his finances, taking medications and making medical decisions."

On December 14, 2016, Fales e-mailed Dr. Lichtenberg asking "I know you already indicated you believed Brownie Kachar, at the time you did his evaluation, had the mental capacity to do a will. Would you put this opinion into a brief report or email to me[?]" Dr. Lichtenberg replied with a statement:

> I evaluated Mr. Kachar in August 2016 and submitted a report based on that evaluation. During the evaluation I was able to assess Mr. Kachar's ability to make informed decisions including underlying choices, understanding and appreciation of his choices and reasoning around his choices. Given that his decisional abilities were intact and that he was aware of his assets, Mr. Kachar, in my professional opinion, did demonstrate testamentary capacity.

Nothing additionally relevant happened over the next several months.

Then, in August 2017, Fales filed a petition to modify the limited co-guardianship because Brownie alleged Karen and Daniel were not acting in his best interest. Brownie stated Karen and Daniel threatened they would take him to jail if he refused a blood test and he was being "bullied" by them. According to Daniel, Brownie was driving when his doctors and the probate court said he was not allowed to and got upset when Daniel and Karen tried to restrict him from driving.

Karen clarified as well that to get Brownie to go to the hospital and take a blood test, she had to call the police and get an ambulance to take him, and that Brownie was furious with her. A few times, Brownie left home in his car and Daniel could not locate him. Medical records from this time reflect Daniel and Karen were "concerned about [Brownie]'s increased agitated behavior and concern of underlying dementia." Karen explained at trial that the reason some of the medical records from this time stated "[d]aughter states only Dan and herself should see patient," was because Nicholas was telling Brownie that he could drive and do anything he wanted. Karen eventually resigned as co-guardian, and Daniel and Nicholas served as limited co-guardians until Brownie's death on June 19, 2022, at the age of 94.

D. WILL CONTEST

On June 30, 2022, appellant filed a petition to probate the 2002 Will and for appointment as personal representative of Brownie's estate. Shortly thereafter, on July 6, 2022, Daniel and Karen filed a competing petition to probate the 2016 Will and for appointment as co-personal representatives of Brownie's estate. Daniel and Karen answered appellant's petition, arguing the 2002 Will was revoked, and alternatively, that the original copy of the 2002 Will was missing, which created a rebuttable presumption that Brownie destroyed the 2002 Will. Daniel and Karen retained Fales to probate the estate using the 2016 Will.

On September 16, 2022, appellant responded to the answer and objected to Daniel and Karen's petition for appointment as co-personal representatives and submission of the 2016 Will, arguing a presumption of undue influence existed based on the circumstances under which the 2016 Will was created. Following several months of discovery, the probate court appointed John V. Deku as special limited personal representative of Brownie's estate on March 9, 2023. Eventually, on March 11, 2024, the probate court commenced a bench trial on whether the 2016 Will was procured by the undue influence of Daniel and Karen. During trial the e-mails and documentary evidence previously discussed were admitted as exhibits. The probate court first heard testimony from Fales and his administrative assistant Linda Novak, who prepared and witnessed the execution of the 2016 Will. After hearing from Fales and Novak, the court determined that the presumption of undue influence by Daniel and Karen applied, see *In re Estate of Karmey*, 468 Mich 68, 77; 658 NW2d 796 (2003), because Daniel and Karen were co-temporary guardians at the time Brownie signed the 2016 Will and they benefited from the changes, requiring them to present evidence to rebut that presumption.

At the next three hearings, the probate court heard testimony from Daniel, Karen, Dr. Siegerman, who testified as an expert witness on traumatic brain injury and undue influence, and two nurses who cared for Brownie after he executed the 2016 Will. On April 12, 2024, appellant moved for involuntary dismissal under MCR 2.504(B)(2), arguing appellees failed to rebut the presumption of undue influence.

On May 30, 2024, the probate court denied appellant's motion, finding that "rebuttal evidence is present and the case is not ripe for dismissal." The court did not make extensive factual findings at this time. The bench trial on whether the 2016 Will was a product of undue influence continued over two days in June 2024, and the probate court heard testimony from Nicholas and appellant. Mayernik's deposition was also submitted for consideration. At the close of the evidence, the probate court took the matter under advisement and issued a 15-page written opinion

on January 16, 2025. In its opinion the probate court decided that the 2016 Will was validly executed, that it was not the product of undue influence, and that it would control the administration of the estate.

This appeal followed.

II. INVOLUNTARY DISMISSAL

A. STANDARD OF REVIEW

Appellant argues the probate court clearly erred by denying his motion for involuntary dismissal under MCR 2.504(B)(2) when it ruled appellees presented sufficient rebuttal evidence to allow this case to move forward. We disagree.

MCR 2.504(B)(2) states:

> In an action, claim, or hearing tried without a jury, after the presentation of the plaintiff's evidence, the court, on its own initiative, may dismiss, or the defendant, without waiving the defendant's right to offer evidence if the motion is not granted, may move for dismissal on the ground that, on the facts and the law, the plaintiff has no right to relief. The court may then determine the facts and render judgment against the plaintiff, or may decline to render judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in MCR 2.517.

Unlike a motion for a directed verdict, "a motion for involuntary dismissal calls upon the trial judge to exercise his function as trier of fact, weigh the evidence, pass upon the credibility of witnesses and select between conflicting inferences." *In re ASF*, 311 Mich App 420, 427; 876 NW2d 253 (2015), quoting *Marderosian v Stroh Brewery Co*, 123 Mich App 719, 724; 333 NW2d 341 (1983). The party opposing the motion "is not entitled to the most favorable interpretation of the evidence." *In re ASF*, 311 Mich App at 427, citing *Marderosian*, 123 Mich App at 724.

We review a trial court's decision on a motion for involuntary dismissal under MCR 2.504(B)(2) de novo. *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). We review a trial court's factual findings supporting that decision for clear error. MCR 2.613(C); *Tuttle v Dep't of State Hwys*, 397 Mich 44, 46; 243 NW2d 244 (1976). A finding is clearly erroneous when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id*. In applying this principle, "regard should be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *Attorney General ex rel Director of Dep't of Natural Resources v ACME Disposal Co*, 189 Mich App 722, 724; 473 NW2d 824 (1991).

B. UNDUE INFLUENCE–BACKGROUND

To establish a claim of undue influence, the charging party, here appellant, must demonstrate:

> that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act against his inclination and free will. [*In re Peterson Estate*, 193 Mich App 257, 259; 483 NW2d 624 (1991), quoting *In re Estate of Mikeska*, 140 Mich App 116, 120; 362 NW2d 906 (1985).]

A presumption of undue influence attaches to a transaction when (1) a confidential or fiduciary relationship exists between the grantor and a fiduciary, (2) the fiduciary benefits from the transaction, and (3) the fiduciary has an opportunity to influence the grantor's decision in that transaction. *In re Estate of Karmey*, 468 Mich at 77. A confidential or fiduciary relationship exists when one party has placed complete trust in the other party who has the requisite knowledge, resources, power, or moral authority to control the subject matter at issue. *Id* at 74-75. Moreover, a fiduciary relationship is a broad term that focuses on relationships involving inequality. *Id*. at 74 n 3. Michigan's Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., states a "fiduciary" includes a guardian. MCL 700.1104(e).

Here, Daniel and Karen were appointed temporary, limited co-guardians for Brownie on August 1, 2016, two days before he executed the 2016 Will on August 3. That made them his fiduciaries at the relevant time. The 2016 Will disinherited appellant and Nicholas and benefited Daniel and Karen because they were to receive a greater share of Brownie's estate upon his death. Further, Daniel and Karen were coordinating Brownie's care[8] beginning in May 2016 and had the exposure and opportunity to influence Brownie. The probate court correctly determined, and the parties do not contest, that a presumption of undue influence applied in this case.

As a result, a mandatory inference existed that:

> shift[ed] the burden of going forward with contrary evidence onto the person contesting the claim of undue influence. However, the burden of persuasion remains with the party asserting such. If the defending party fails to present evidence to rebut the presumption, the proponent has satisfied the burden of

[8] The order denying appellant's motion for involuntary dismissal described Daniel and Karen as Brownie's "primary caretakers." Although they were his limited co-guardians at the time the 2016 Will was executed, Brownie had been receiving full time care at Rainbow from about April 28 to August 1, 2016, and Daniel and Karen visited him often. The order went on to state that after he returned home, Brownie lived alone and Daniel and Karen "were certainly not his primary caretakers . . . ," because they did not live with him and he had in-home nursing care. While these statements in the order are inconsistent, neither is necessarily incorrect as they may be describing different types of "caretaking," such as medical, physical, or financial.

> persuasion. [*Peterson*, 193 Mich App at 260, quoting *Mikeska*, 140 Mich App at 121.]

In other words, appellees needed to present contrary evidence and, if they failed to do so, appellant's motion for involuntary dismissal would be granted.

C. THE PROBATE COURT DID NOT CLEARLY ERR IN FINDING THAT REBUTTAL EVIDENCE EXISTED TO DENY THE MOTION FOR INVOLUNTARY DISMISSAL

Appellant argues that the probate court erred in denying his motion for involuntary dismissal. We disagree.

As an initial matter, we note that appellant's brief treats the order denying his motion for involuntary dismissal as the probate court having decided the undue influence issue on the merits, but that is not the case. As stated above, a motion for involuntary dismissal under MCR 2.504(B)(2) gives the probate court two options: (1) it can decline to render judgment until the close of all the evidence, or (2) it can determine the facts and render judgement on the merits. If the probate court chooses the second option, it must make findings as provided by MCR 2.517.

Here, however, the probate court did not fully decide on the merits at the involuntary-dismissal-stage whether the 2016 Will was a product of undue influence. It only found that, based on the record presently before it, "there is sufficient proof to allow the case to move forward" and that "the case is not ripe for dismissal." That was a conclusion that the probate court was not rendering a "judgment on the merits," but instead viewed the existing evidence rebutting the presumption as sufficient to wait and render judgment at the close of all the evidence, such that appellant was not entitled to involuntary dismissal. Therefore, under MCR 2.504(B)(2), it was not required to make any factual findings. Even so, the probate court summarized the evidence presented thus far, which were the events leading to the appointment of Daniel and Karen as limited co-guardians, and the description of Brownie's "day-to-day existence during the time leading up to and after the will," and concluded there was "ample proof that the matter cannot be dismissed involuntarily."

Thus, when deciding whether there was any error in denying the motion for involuntary dismissal, we need only address whether, after the four initial hearings, the probate court clearly erred in concluding that *any* evidence cited in the order could properly be considered rebuttal evidence. In the challenged order, the probate court wrote, that "all witnesses" heard thus far, including Novak, Fales, Daniel, Karen, the two nurses who cared for Brownie, and Dr. Siegerman, confirmed Brownie was "extremely strong-willed," which "consistently" supported that Brownie made the 2016 Will "of his own free will."[9] The order also acknowledged that Daniel and Karen's

[9] Appellant argues the probate court erred to the extent it considered the nurses' testimony about Brownie's stubbornness because the testifying nurses, Michelle Swinton and Kelly Koustas, did not begin caring for Brownie until 2017, after the 2016 Will was executed. But there was plenty of testimony from the other witnesses about Brownie's stubbornness before the 2016 Will was executed such that the probate court could have made the same conclusion without the nurses' testimony.

guardianship was "limited," "recognizing [Brownie's] capacity to control his own finances but recognizing the need to put someone in charge of Brownie's physical care—mostly due to his absolute refusal to do so himself, or to tolerate others helping him."

Appellant contends that the finding that Brownie was stubborn should have led the probate court to conclude he was more susceptible to undue influence, not less. He cites no case law to support this contention, yet he faults the probate court for citing *In re Bednarz Trust*, unpublished per curiam opinion of the Court of Appeals, issued June 16, 2009 (Docket No. 283699), p 6, where this Court reasoned a grantor's strong-willed and stubborn personality meant he would not be easily influenced. We acknowledge that unpublished opinions from this Court have no binding authority but can be considered for their persuasive value. *Demske v Fick*, 351 Mich App 289, 304 n 14; 35 NW3d 657 (2024). Even so, the probate court properly relied on *Bednarz Trust*. A grantor's personality can be indicative of their relative susceptibility to undue influence, as if someone is strong-willed, it logically follows that they are not likely to be susceptible to "moral coercion sufficient to overpower volition, destroy free agency and impel [them] to act against [their] inclination and free will." *Peterson*, 193 Mich App at 259 (citation omitted). Thus, the probate court did not clearly err by considering Brownie's stubbornness as evidence that can rebut the presumption of undue influence.

Next, appellant faults the probate court for stating this case is like *Bednarz Trust*, unpub op at 7, because in that case the decedent sought independent counsel, whereas here, appellant argues Fales was not independent and communicated, coordinated with, and even represented Daniel and Karen's interests. Further, appellant argues the decedent in *Bednarz*, unpub op at 6-7, expressed his wishes independently from the beneficiary of the challenged will, who was absent during the decedent's meetings with his attorney that led to execution of the challenged documents, whereas here there was no evidence that Fales ever presented Brownie with a draft of the 2016 Will or discussed it with Brownie before it was executed.

But the probate court here did not go as far as appellant asserts. It did not make factual findings on Brownie's relationship with Fales before he signed the 2016 Will. All the order denying involuntary dismissal said was that "[t]his case preliminarily presents similar circumstances as in *Bednarz*; the court must hear any other testimony and look at any other evidence and make a decisions on the merits of the case." Moreover, by the time appellant moved for involuntary dismissal the probate court had heard testimony from Novak and Fales[10] that Brownie met with Fales in-person at his office before later signing the 2016 Will in Brownie's home. The court did not err comparing this case to *Bednarz* for purposes of its order.

Appellant also argues the probate court's statement that Brownie had the "capacity to control his own finances" was clear error requiring reversal, citing to Gaynor's guardianship. But the probate court was referencing Daniel and Karen's subsequent temporary co-guardianship over Brownie beginning on August 1, 2016, after he returned home from Rainbow, that gave them

[10] Regarding Fales and Novak, appellant states that "because their testimony actually established the presumption," it also "cannot possibly have rebutted the presumption." That is not true. A witness can provide testimony that weighs both in favor of and against a factual finding or outcome.

limited "authority to pay bills, and authority to make medical and placement decisions." Being authorized to help Brownie pay his bills did not mean Brownie could not control his finances because he still had the authority to spend money as he wished under the limited co-guardianship—testimony from his nurses in late 2016 while under the limited co-guardianship showed they often took Brownie to the casino. The probate court did not clearly err in considering this as evidence rebutting the presumption.

Appellant's next several arguments challenge the probate court's summary of the testimony it considered evidence rebutting the presumption such that it was not going to "render judgment until the close of all the evidence" under MCR 2.504(B)(2) on whether the 2016 Will would be probated:

> There are also other circumstances that help explain the second will from Brownie's perspective. The impetus for the second will arose out of a very difficult family situation. In May and June of 2016, [appellant], the son who previously had power of attorney, became frustrated and simply walked away, forcing Daniel to act in his stead. Regardless of the difficulty of the situation, or whether or not [appellant] was justified in this decision, it created a serious problem. The only person with any authority to intervene or make decisions for Brownie was refusing to help. Brownie, suffering from a terribly painful series of bed-sores, wanted out of the care home he was residing in, and understandably so under the circumstances.[] Daniel and Karen were forced to appeal to the court to secure the authority they needed to help Brownie accomplish his goal of moving out of the care home. This is not unreasonable either—a power of attorney, guardian, or any fiduciary, is supposed to honor the wishes of the person they have authority over as much as possible. The testimony of Daniel and Karen [] surrounding these events was credible. It is also supported by the timeline in the documents and evidence entered during the [prima facie] case presented. Daniel testified his father wanted to stop by the attorney's office before he even got home, he was so mad at [appellant] for leaving him in the care home.[] It seems entirely possible the appointment of a limited guardian became necessary due to the gap created by [appellant] refusing to operate as a patient advocate for his father, not as part of a larger plot to increase the inheritance for Daniel or Karen. Further, the expenses associated with in-home care, litigation, expert consultation and attorney fees were likely exorbitant, further undermining the idea that Daniel and Karen simply wanted to have a new will drafted. The witnesses dealing with Brownie all confirmed he lived alone and that Daniel and Karen visited, but were certainly not his primary caretakers, thus providing further support that rebuttal evidence is present and the case is not ripe for dismissal.

Appellant contests certain details in the probate court's summary, but the summary provided an alternative explanation based on the evidence for why Brownie signed the 2016 Will meaning some rebuttal evidence had been presented, which supported the probate court's decision to not yet render judgment on the merits.

Appellant dislikes the probate court's characterization of his actions as him having "walked away" from Brownie, arguing he filed for guardianship to ensure Brownie received care at

Rainbow, and Daniel was not "forced to" do anything. The testimony established the family initially communicated well after Brownie's motor vehicle accident, and appellant acted as his DPOA for Healthcare to coordinate in-home nursing care up until May 2016. But the probate court could fairly conclude from the evidence it had heard and seen that because appellant was not communicating with any of his siblings after the altercation on April 28, 2016, and did not visit Brownie at Rainbow, or at all after his release, that appellant "walked away" at least in part, leaving Daniel and Karen to deal with Brownie's pleas to return home and coordinate in-home care upon discharge. While Brownie's decision to disinherit appellant for these reasons may have been unfair, the probate court's findings that circumstances surrounding the execution of the will was rebuttal evidence as to undue influence was not clearly erroneous.

The same goes for appellant's argument that the probate court clearly erred in denying his motion for involuntary dismissal because the "self-serving," false, uncorroborated testimony of the witnesses up to that point—particularly Daniel and Karen—was insufficient to rebut the presumption of undue influence. As stated, we give due regard "to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *Acme Disposal*, 189 Mich App at 724. At this point, the probate court found Daniel's and Karen's testimony surrounding the events leading up to the execution of the 2016 Will credible for the limited purpose of rebutting the presumption such that it was delaying a decision on the merits It did not affirmatively decide that the presumption had been rebutted such that it was finding there was no undue influence on the merits. The probate court's determination is not clearly erroneous.

Appellant further argues that Novak and Fales's testimony supported the presumption of undue influence. But the question as to this motion is not whether the presumption applied (the probate court found that it did), the question is whether the probate court erred by denying the motion and, based on the evidence presented, reserved a decision on the merits for later.

Because the probate court did not err in denying the motion for involuntary dismissal under MCR 2.504(B)(2) based on clearly erroneous findings, we affirm the order.

III. THE PROBATE COURT DID NOT ERR IN FINDING BROWNIE WAS NOT SUBJECT TO UNDUE INFLUENCE

Appellant next challenges the probate court's final January 16, 2025 order that found the August 2016 Will was validly executed, was not a product of undue influence, and therefore controlled the administration of the estate.

A. STANDARD OF REVIEW

Undue influence is an equitable matter. *Adams v Adams*, 276 Mich App 704, 714 n 5; 742 NW2d 399 (2007). Michigan appellate courts review dispositional rulings on equitable matters de novo. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005). However, as with an order deciding a motion for involuntary dismissal, we review findings of fact made by a probate court sitting without a jury for clear error. *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003). A finding is clearly erroneous when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Tuttle*, 397 Mich at 46.

B. ANALYSIS

" 'Undue influence' " exercised upon one who executes a will may become the basis for finding the will invalid *if that influence took from the testator his right to freely exercise his discretion* in disposing of his property." *In re Sprenger's Estate*, 337 Mich 514, 521-522; 60 NW2d 436 (1953) (emphasis added). "This is because undue influence is something which destroys the free agency of the testator at the time when the instrument is made, and which, in effect, substitutes the will of another for that of the testator." *In re Mardigian Estate*, 502 Mich 154, 160; 917 NW2d 325 (2018) (quotation marks and citation omitted). However, "motive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, are not sufficient." *In re Karmey Estate*, 468 Mich at 75 (citation omitted). There must be "sufficient" contrary evidence to rebut a presumption of undue influence. *Bill & Dena Brown Trust v Garcia*, 312 Mich App 684, 701; 880 NW2d 269 (2015).

As an initial matter, appellant suggests that the probate court should not have found Brownie to have testamentary capacity because it "was never pled in this case" and someone with testamentary capacity may still be unduly influenced. The probate court's final order, however, concluded as follows: "as long as he was competent (which this Court finds him to be), and free from undue influence (which this Court also finds him to be) Brownie did not have to have any reason at all to change his will, it was up to him to do what he wished with the objects of his bounty."

It was not error for the probate court to say that Brownie was "competent," meaning that he had testamentary capacity. To have testamentary capacity, "an individual must be able to comprehend the nature and extent of his property, recall the natural objects of his bounty, and to understand the disposition which he desires to make." *In re Sprenger's Estate*, 337 Mich at 521. See also MCL 700.2501(2). Testamentary capacity is presumed and whether one has it is judged "as of the time of the execution of the instrument." *In re Powers Estate*, 375 Mich 150, 158; 134 NW2d 148 (1965). It generally means the same thing as mental capacity as used in MCR 700.2501. While "competency" is at issue with the decision to appoint a guardian, the appointment of a guardian does not by itself mean someone lacks testamentary capacity. A person could be legally incapacitated (as evidenced by the appointment of a guardian) yet still possess testamentary capacity to change their estate plan. *In re Sprenger's Estate*, 337 Mich at 521.

Substantively as to undue influence, appellant challenges Fales's testimony and the probate court's characterization of Fales as a "dedicated attorney" who "continue[d] to answer the calls from Brownie," "long after [appellant] gave up advocating for his father" to support its conclusion. He argues the evidence showed Fales was working for Karen and Daniel, and, acting in concert, they unduly influenced Brownie to execute the 2016 Will. But overall, the evidence does not undercut the probate court's factual findings and instead supports the court's conclusion that Brownie validly executed the 2016 Will and was not subject to undue influence.

The first indication that Brownie wanted to change his will was on April 28, 2016, after the altercation with appellant. Daniel testified Brownie asked to go to Fales's office before proceeding to the hospital, but no one was there. Further, Fales testified he visited Brownie in May 2016 at Rainbow, even though Rainbow was "an hour and a quarter" drive from Fales's office (E Tr I, 125-126). And although it is contested when exactly a second meeting with Fales occurred,

Brownie went to Fales's office where Novak heard Brownie talk about appellant having borrowed $50,000 and refused to pay it back, before Fales and Brownie continued the meeting in the conference room. Thus, on two separate occasions outside the presence of Daniel and Karen, Brownie acted consistent with wanting to change his will.

Also, the documentary evidence supports the probate court's conclusion. In a July 6, 2016 e-mail to Daniel and Karen, Fales wrote: "I talked with Brownie this afternoon. He wants to redo his will." This email shows two things: that Fales spoke to Brownie, and that a conversation about changing the will happened without Daniel and Karen because Fales had to inform them of it via e-mail. Appellant faults the probate court for ignoring that the e-mail also stated that a new will may not be probated because of psychological evaluations done on Brownie in January 2016 after his accident. But Dr. Lichtenburg later evaluated Brownie and opined on August 1, 2016 that Brownie had testamentary capacity: "I have no doubts that he is capable of making a new will. His decision making abilities are a strength." Further, contrary to appellant's argument, Fales never stated Brownie was *susceptible* to undue influence in the July e-mail, he only recognized that Brownie's health circumstances in the summer of 2016 could lead to an inference that Brownie lacked testamentary capacity, which is an overlapping[11] but legally distinct inquiry, and which Dr. Lichtenburg addressed in e-mails with Fales.

Although appellant faults Fales for communicating about Brownie's plan to change his will with Daniel and Karen, Fales's testified that Brownie sometimes did not have his cell phone on him, and Brownie "didn't do email or text." And while Karen and Daniel helped schedule a date and time for Fales to come to Brownie's home to execute the 2016 Will, and they coordinated payment for legal services, Novak and Fales both testified Daniel and Karen were not present when Brownie signed the 2016 Will. Fales thus communicated with Daniel and Karen about logistics, and Fales testified he never discussed with them the changes Brownie wanted to make and never sent them a copy of the proposed will before Brownie signed it.

Appellant also claims Fales had a conflict of interest, evidenced by him having filed the petition to appoint Daniel and Karen as Brownie's partial co-guardians, and the petition represented that Daniel was the petitioner and Fales signed as Daniel's attorney. But Fales insisted "[a]ny time that I did anything was for what Brownie wanted me to do," and "I was representing Brownie [] with his request that his son be appointed his guardian." The probate court acknowledged Fales "walk[ed] the line in doing the best for his client," but it did not clearly err in concluding Fales represented Brownie alone. Notably, while the rebuttable presumption of undue influence existed here, it usually comes into play when "a patient makes a will in favor of his physician, a client in favor of his lawyer, or a sick person in favor of a priest or spiritual adviser,

[11] They are overlapping inquiries because the same facts may be relevant to both. See *McPeak v McPeak*, 233 Mich App 483, 492; 593 NW2d 180 (1999) (holding that a jury verdict finding both undue influence and mental incapacity is not an inconsistent verdict where the facts informing the undue influence analysis occurred over an extended period of time, and the facts informing mental capacity pertain to the specific moment of execution). Further, the law recognizes that evidence of events both before and after a will was executed may support an inference of undue influence. See *Leffingwell v Bettinghouse*, 151 Mich 513, 518; 115 NW 731 (1908).

whether for his own personal advantage, or for the advantage of some interest of which he is a representative." *In re Hartlerode's Estate*, 183 Mich 51, 60, 148 NW 774 (1914). Fales's representation may have been imperfect but he gained nothing by effectuating Brownie's wishes. The probate court's conclusion that he was "dedicated counsel" indicates only that it determined that Fales was dedicated to effectuating Brownie's wishes.

Appellant also argues the probate court erred in its conclusion as to undue influence when it ignored the testimony that Brownie was delusional, paranoid, isolated, traumatically brain injured, undergoing severe personality changes, and accusing people of things they did not do between the time of his automobile accident and when he executed the new will. This testimony included Brownie's claim that he was anally raped at Rainbow, and his claim that appellant borrowed $50,000 and refused to pay it back. Appellant believes this testimony proves Brownie was susceptible to undue influence.[12]

But appellant oversimplifies and mischaracterizes the totality of the evidence. The testimony demonstrates Brownie's reasons for changing the will were the events of the spring and summer of 2016, including the April 28 dispute, and appellant's "vote" to admit Brownie to Rainbow against his wishes, and the dispute about the $50,000 loan/gift. Brownie had reasons for making the changes reflected in the 2016 Will that are not undermined by testimony that he was also, at times, limited. Our Supreme Court has recognized that "the lack of wisdom in the disposition of the property" and "the fairness of the provisions of the will" should not "influence the court in a determination of mental competency." *In re Sprenger's Estate*, 337 Mich at 521.

Appellant also faults the probate court for ignoring Nicholas's and appellant's testimony that appellees often spoke ill of appellant to Brownie during the summer of 2016 and the dispute about whether he would remain at Rainbow. While evidence of interference with a testator's relationships can support a claim for undue influence, *In re Peterson Estate*, 193 Mich App at 259, the probate court still had to evaluate that evidence in the broader context of the case, and whether it believed this testimony against Karen and Daniel's denial that they disparaged appellant in front of Brownie was a credibility determination which we will not interfere with. Brownie's interactions with Fales ultimately showed his exercise of his free will.

Finally, appellant briefly argues there was no medical or psychological evaluation offered to contradict Dr. Siegerman's expert testimony that Brownie was susceptible to undue influence and the will was a product of undue influence. But Dr. Siegerman's evaluation was not completed until 2017, long after Brownie signed the will, and it was not clear error for the probate court to minimize Dr. Siegerman's importance when Dr. Lichtenberg provided reports supporting Brownie's ability to make a decision, and a professional opinion via email that he had testamentary capacity two days before he executed the 2016 Will.

The ultimate question is whether appellees rebutted the presumption that the 2016 Will was the product of undue influence with sufficient contrary evidence, and whether the probate court's

[12] Appellant says the physical evidence showed there was no $50,000 loan. This is true. After Fales investigated the issue, he did not find any documentary evidence of the loan to appellant from Brownie's checking account.

conclusion is erroneous, either because it is based on clearly erroneous findings of fact or otherwise. The probate court's rationale for concluding there was no undue influence in this case reasonably focused on what happened around the time the will was executed and Brownie's ability to make an independent decision.

In all, while appellant complains that the probate court did not emphasize his preferred testimony and evidence, there is ample evidence supporting the probate court's conclusion such that it did not clearly err in its factual findings or otherwise err in its conclusion. There is no direct or circumstantial evidence in the record that, for example, Daniel and Karen told Brownie that if he changed his will they would allow him to return home or do anything else. The probate court correctly reasoned that because appellees lacked authority to decide to move Brownie home, there was no affirmative evidence that they exercised control. Absent such affirmative evidence of influence or control, the probate court did not err in finding that appellees had rebut the initial presumption of undue influence. Whether or not it was fair to appellant, Brownie had reason for doing what he did, and based on the facts, the probate court did not err in finding that his reasons were not based on undue influence.

We affirm.

/s/ Michael J. Kelly
/s/ Colleen A. O'Brien
/s/ Andrew J. Lievense